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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

GEORGE T. DAVIS,
745 Market Street,
San Francisco, California 94103;
Attorney for Petitioner.

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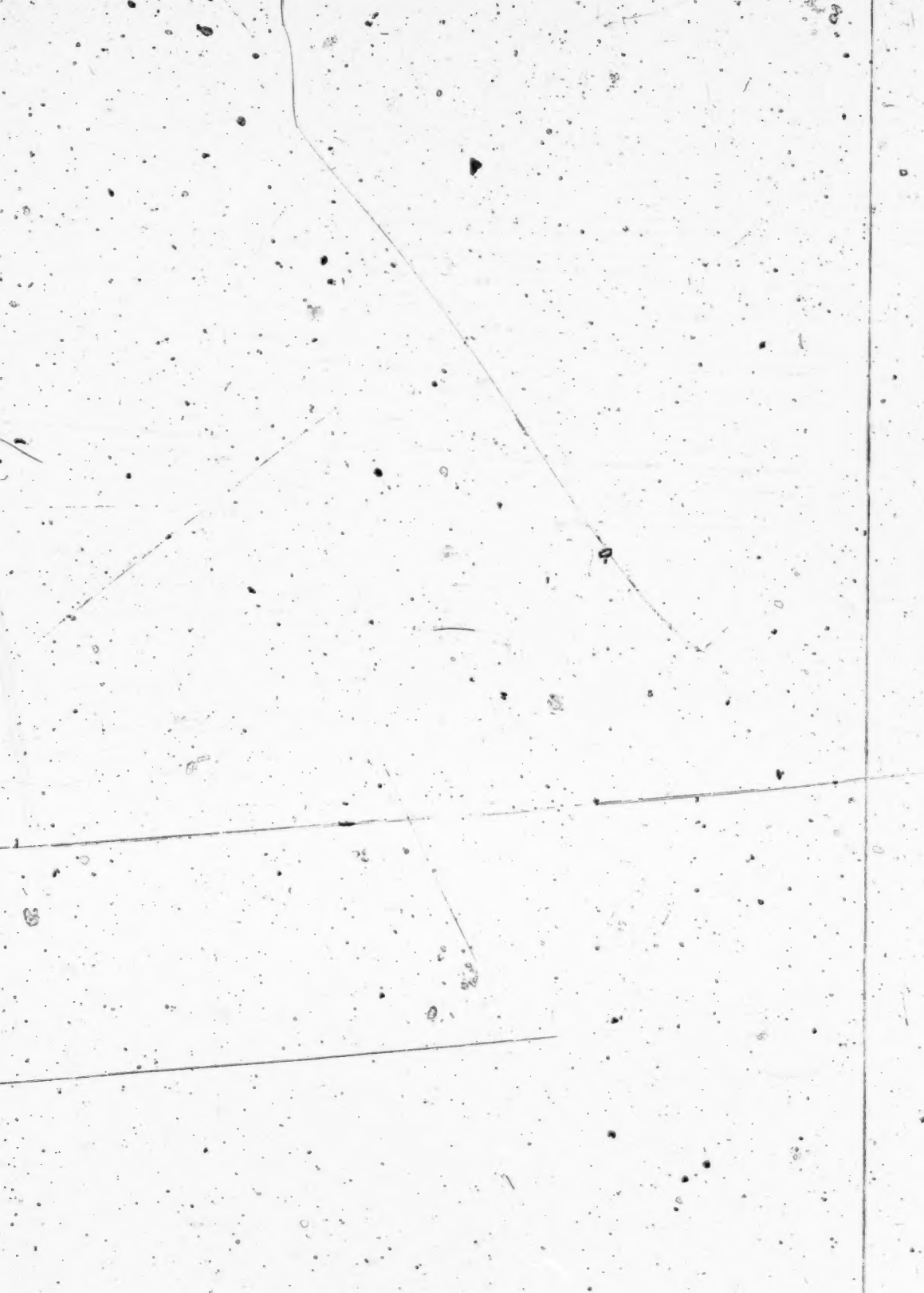

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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California rendered and entered November 8, 1967.

JURISDICTION

Petitioner filed his petition for writ of habeas corpus September 21, 1967, in the Supreme Court of the State of California, which sets forth facts, not patently false or frivolous, showing that petitioner is

imprisoned for life by a first degree murder conviction, as the result of denial of Fourteenth Amendment due process in his jury trial. The order of the California Supreme Court denying the habeas corpus petition was rendered and entered November 8, 1967. (Appendix A.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, Subsection 3. (Appendix B.)

QUESTION PRESENTED

The question presented for review is:

Does introduction of a codefendant's confession which inculpates the petitioner, deny petitioner due process right to confront witnesses against him, even though the court instructs the jury not to consider the confession as against the petitioner?

STATUTES INVOLVED

The case involves: The Sixth and Fourteenth Amendments, United States Constitution; Article VI, Section 4, and Article I, Section 5, California Constitution; and Section 1111, California Penal Code; the pertinent provisions of which are set forth in Appendix B.

STATEMENT OF THE CASE

Summary

On June 11, 1959, petitioner Ernest C. Pickens was sentenced to life imprisonment by the Superior Court of the State of California in and for the City and

County of San Francisco, in Action No. 55,765, *People of the State of California v. Ernest C. Pickens and Walter Senior.* (RT 333.)[1] The judgment was affirmed in 1961, *People v. Pickens,* 190 Cal.App.(2d) 138. (Appendix C.)

During the trial, the prosecution introduced, over the objection of petitioner, the accusatory confession of the codefendant Walter Senior, both by tape recording played to the jury, and by a written transcript of the recorded confession read by the jury. (RT 131-174.) The accusatory confession of codefendant Senior is set forth verbatim, RT 132-174. The attorney for petitioner Pickens specifically objected that even if the jury was instructed not to consider it against petitioner Pickens, that nevertheless the statement was hearsay and prejudicial to petitioner:

> "Mr. Giubbini (for the State): First of all, the statement is a statement from the defendant Walter Senior, and would not be admissible against the defendant Pickens, who is a client of Mr. Woodman's, so that I'm not certain that he has a right to make the objection at this time.
>
> Mr. Woodman (for Pickens): Oh, yes, I do, your Honor." (RT 126.)

> "Mr. Woodman: . . . it's an extrajudicial statement, purely hearsay . . . this is strictly a self-serving declaration on the part of Mr.——
>
> The Court: I know, but it doesn't apply to your client——
>
> . . . Mr. Woodman: —it's an act—I'll put it this way: basically, it's an accusation that two

[1] "RT" means reporter's transcript of testimony.

(a) Violated the right of petitioner to confront the witnesses against him, contrary to the due process clause, Fourteenth Amendment, United States Constitution. . . ."

(Page 8, Petition for Writ of Habeas Corpus.)

Detailed Trial Situation

The opinion in *People v. Pickens,* 190 Cal.App.(2d) 138, 141-144 (Appendix C), discloses the following:

The body of Charles Ackley was found on March 2, 1959, at 8 a.m., in a grove of trees near Sharp Park Golf Course. The autopsy disclosed that death occurred an estimated 30-48 hours earlier, from a brutal beating. An accomplice Mary Maribo was the chief witness against petitioner. She testified that at 5 p.m. of February 26, 1959, she was at petitioner's house on Lee Street, San Francisco, and there saw petitioner and codefendant Walter Senior bring in the victim and thereafter beat and kick him to unconsciousness. She herself and petitioner's wife Wanda also joined in the kicking. She and Walter Senior left at 9 p.m. The evening of the next day February 27, 1959, Senior told her the victim was alive in the basement of the Pickens house; and on February 28, 1959, Senior told her Ackley had left.

(In California, Section 1111, California Penal Code, specifically prohibits a conviction based on the testimony of an accomplice, unless there is other evidence "as shall tend to connect the defendant with the commission of the offense.")

The only non-accomplice evidence remotely tending to connect Pickens to the commission of the crime was the testimony of Opal Fanning that on February 26 she saw petitioner and codefendant Senior at her apartment and that when codefendant Senior went out for a bottle, petitioner Pickens told her he was going to kick the - - - - out of Ackley, but:

"(H)e didn't say when he was going to do it . . ." (RT 50.)

Lena Galli testified for the State that on the afternoon of February 26, 1959, in front of a San Francisco union hall, two unidentified men forced a man who seemed to be quite drunk out of his car into theirs, and drove off, punching him. (RT 54.)

The prosecution then introduced the hearsay accusatory statement of codefendant Walter Senior, and rested. This oral statement inculpating petitioner was in the form of a tape recording, and was played to the jury to whom had been distributed typed transcripts thereof (People's Exhibit No. 14 for indentification) to read during the playing of the tape. (RT 131-174.) The complete text of this statement inculpating petitioner Pickens is set forth in RT page 132, line 11, through page 174, line 8. (In essence, it thoroughly corroborated the sordid testimony of the accomplice Mary Maribo and transfixed petitioner with guilt of the crime charged.)

(Petitioner Pickens at all times objected to the introduction of the statement of codefendant Senior, as set forth previously.)

In response to the use at his trial of the oral statement of codefendant Senior inculpating him, Pickens testified in his own defense. (RT 176-255.) His testimony was that the decedent Ackley was so drunk as hardly to be able to stand; that petitioner Pickens was equally drunk; that it was Mary Maribo, not he, who physically attacked and fought Ackley; that petitioner from time to time separated the two; but Mary Maribo continued her drunken attack on Ackley. Finally petitioner went to sleep, and that was the last time he saw Ackley, dead or alive.

Wanda Pickens, the wife of petitioner, testified for petitioner, corroborating his version of the matter. (RT 268-304.)

Codefendant Walter Senior did not testify.

ARGUMENT

(1) Where conviction is result of violation of due process, certiorari lies to require State Court to enforce habeas corpus. *Pennsylvania v. Claudy,* 350 U.S. 116, 100 L. ed. 126; *Palmer v. Ashe,* 342 U.S. 134, 96 L. ed. 154; *Uveges v. Pennsylvania,* 335 U.S. 437, 93 L. ed. 127.

(2) Trial use of a codefendant's confession inculpating petitioner is violation of due process right to confront witnesses. *Douglas v. Alabama,* 380 U.S. 415, 13 L. ed. (2d) 934; *Brookhart v. Janis,* 384 U.S. 1, 16 L. ed. (2d) 314; *Painter v. Texas,* 380 U.S. 400, 13 L. ed. (2d) 923.

(3) The statement of codefendant Senior was extremely prejudicial.

By reason of the accomplice corroboration rule in California (Section 1111, California Penal Code), and the absence of any strong non-accomplice evidence "tending to connect the defendant with the commission of the offense, Pickens could well have been acquitted, either by not testifying at all and arguing the extreme lack of non-accomplice testimony to the jury; or by testifying and pitting his credibility solely against that of Mary Maribo. But the Senior confession changed all that, and must of itself have strengthened the case against petitioner in the minds of jurors otherwise disposed to adhere to the California accomplice-corroboration rule.

(4) Petitioner made the appropriate objections during his trial and appeal.

It must be emphasized that the due process right in a criminal case to confrontation of witnesses is:

> ". . . in its primary and indispensable aspect . . . merely an application of the common-law rule against the admission of hearsay testimony, that is, testimony, the accuracy of which has not been subjected to the test of cross-examination . . ." *People v. Valdez,* 82 Cal.App.(2d) 744, 749; 5 Wigmore on Evidence (3d ed. 1940), §§1362, 1365, 1395-1397.

Thus Pickens from the very first, by his hearsay objections in the trial Court, duly and timely invoked the substance of the right to confront witnesses, federally guaranteed him by the Fourteenth Amendment.

RULE 19 STATEMENT

The special and important reasons for a review on writ of certiorari are:

(1) Although the United States Supreme Court has clearly established that trial use of hearsay statements against a non-declarant defendant constitutes denial of due process, it is not clear today whether such violation of due process can be cured by an instruction to the jury not to consider it against the non-declarant.

Della Paoli v. United States, 352 U.S. 232, 1 L. ed. (2d) 278, appears overruled by implication of the holding in *Jackson v. Denno,* 378 U.S. 368, 12 L. ed. (2d) 908.

> ("If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence." *People v. Aranda,* 62 Cal. (2d) 518, 528-529.)

Also, *Douglas v. Alabama,* 380 U.S. 415, 419-420, 13 L. ed. (2d) 934, 937-938, specifically held that a statement, not introduced for its truth as against the non-declarant defendant, nevertheless violates due process.

By reason of the foregoing, it appears that the state Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari to the Supreme Court of the State of California should be granted.

February 1, 1968.

Respectfully submitted,
GEORGE T. DAVIS,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

In the Supreme Court of the State of California

In Bank

Criminal No. 11,521

In re Pickens
On Habeas Corpus

Petition for writ of habeas corpus denied.

/s/ Traynor
Chief Justice

Mosk, J. did not participate.

Filed November 8, 1967
William I. Sullivan

Appendix B

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

United States Constitution, Fourteenth Amendment, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

28 U.S.C. 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows: . . . (3) By writ of certiorari, . . . where any . . . right . . . is specially set up or claimed under the Constitution, . . . of . . . the United States." June 25, 1948, C. 646, 62 Stat. 929.

Section 1111 California Penal Code:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Article I, Section 5, California Constitution:

"The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension."

Article VI, Section 4, California Constitution:

"The Supreme Court . . . shall also have power to issue writs of . . . habeas corpus . . ."

Appendix C

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Crim. No. 3701

ERNEST C. PICKENS,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPINION

The appellant, Ernest C. Pickens, and Walter Senior were jointly charged by indictment with the murder of Charles Ackley on or about February 26, 1959. Both entered pleas of not guilty and were tried together before a jury which found the appellant guilty of first degree murder and Senior guilty of second degree murder. Senior was sentenced, and by stipulation of counsel, the jury was discharged and appellant's punishment fixed by the court at life imprisonment. Appellant's motion for a new trial was

denied and judgment entered. No appeal has been taken by Senior. On this appeal from the judgment and the order denying his motion for a new trial, the appellant argues that (1) the evidence does not support the verdict; (2) the trial court erred to his prejudice by allowing the district attorney to improperly impeach his own witness; (3) he was denied due process of law by the admission into evidence of an illegally obtained involuntary confession of the co-defendant, Senior.

The record reveals the following facts: On March 2, 1959, at about 8 a. m., the body of an individual in his middle sixties, weighing approximately 180 pounds, was found in a grove of trees across from the Sharp Park Golf Course. The autopsy was performed at 1:30 p. m. on March 3, 1959, and it was estimated that death had taken place from 30-48 hours earlier. The autopsy disclosed extensive trauma of the entire body. A 2-inch wide strip of the head had been shaved from the forehead to the back of the head. There were superficial abrasions and lacerations of the skin along the shaved strip and a slightly depressed abrasion about 1 inch in diameter on the right forehead. The eyes were swollen shut and discolored, evidencing hemorrhages; the nose was markedly distorted, showed a fracture of the nasal cartilage and was filled with dried blood. The upper lip had a cut through the entire lip and the lower lip showed a deep laceration. Both lips were covered with blood and covered with dirt—like material was on the tongue. There were numerous small bruises around

the neck and shoulders and on the back, chest, left abdomen and hip and areas of discoloration about 1 inch in diameter, representing similarly inflicted types of injury, as well as breaks in the skin over the left hip and left thigh and similar injuries to the buttocks.

The chest area showed a complete transverse fracture of the entire body of the sternum. As the sternum at the point of fracture is a little less than 1 inch thick, pressure in excess of 100 pounds is needed to cause a fracture. Such pressure may be caused by a kick from a horse, a body impinged on a steering wheel or by one person jumping on the chest of one lying prone. The rib cage was fractured on both sides and the lungs were both lacerated by fragments of the fractured ribs.

The coloration of the various bruises indicated that all were not inflicted at the same time, but it was clear that all of the injuries were inflicted before death. The county pathologist was of the opinion that the more recent bruises were inflicted 24 hours before death and the older bruises represented an additional 24 hours. The county pathologist also testified that this was the most severe infliction of injury by human intervention that he had ever seen and concluded that death had been caused by the numerous injuries described above, and that a person with such injuries would suffer severe pain and have great difficulty breathing and moving.

On March 12, 1959, a gunny sack containing blood-stained clothing, including a belt with the name

Charles Ackley on it, was found at Devil's Slide, south of the place where the body had been found. The body was identified as Charles Ackley.

On March 11, 1959, Mary Maribo was picked up and booked as a drunk by police officers of San Mateo County; she knew the victim, Charles Ackley, who also lived at the Vincent Hotel on Turk Street in San Francisco. On Wednesday, February 25, 1959, the appellant, Pickens, and Senior helped her move from the Vincent Hotel to a room on 16th Street. The appellant lent her the money to pay the rent on her new apartment. As she couldn't move her trunk and other large items to her new home, the appellant took them to his home on Lee Street in San Francisco.

The next day, Thursday, February 26, Mary saw Ackley about 11 a. m. on Valencia Street with one Staley; Ackley was drunk and staggering. Mary called the appellant's wife, Wanda, to see if they were going to bring her trunk and things. Mrs. Pickens then invited Mary to come out and help put up some curtains at the Pickens home. The appellant and Senior picked up Mary in their truck about noon and took her to the Pickens home; they then left for a short while to get some groceries. They returned about 1 p. m. with the groceries and 2 fifths of wine. Mary told Wanda that Ackley had said Wanda had been a prostitute before her marriage. Wanda repeated this to the appellant, and apparently gave him the impression that Ackley had said that the appellant had held Wanda while Ackley had intercourse with her. Mary then repeated what she had said and

told the appellant that Ackley had said other things about him in a bar. The appellant got very angry, called Ackley a dirty name, cursed, and threatened to make Ackley commit an indecent act with his dog. The appellant and Senior then left.

They returned to the Lee Street home about 5 p. m. with Ackley and brought him into the house. Ackley's teeth were out of his mouth and his lips were bleeding. The appellant pushed Ackley into a chair and asked him about the alleged statements. Ackley denied making the statements but the appellant said he knew Ackley had said them and slapped Ackley in the face. Ackley and the appellant slapped at each other until Senior entered and hit Ackley in the face. Ackley tried to defend himself but could not do very much against his two assailants. The two women left the room and could hear the sound of flesh hitting flesh.

When Mary returned to the living room a short while later, Ackley was naked and lying on the floor. The appellant told her to kick Ackley in the groin, which she did. Wanda and the appellant also kicked him. The two women again left the room; when they returned, they noticed that Ackley's head had been shaved from his forehead to the back of his head, and he was sitting in a chair and asking the appellant and Senior to stop.

The appellant went outside and came back with a large dog. Ackley said: "no, no, no," and the appellant said: "Oh, yes" and then pushed Ackley's head between the dog's legs. Mary again left the room.

When she returned, Ackley was lying on the floor with one eye closed and his entire face bloody and mashed up. The appellant and Senior were sitting on the davenport. As Ackley's blood was getting on the rug, they moved his head into the fireplace. There was blood on the floor from his nose, and feces on his body.

About 9 p.m., Mary and Senior left in a cab; the appellant told her she hadn't been out there and advised her to say she hadn't seen Ackley that day. The next day, February 27, Mary called the Pickens home and the appellant told her Ackley was all right. He repeated his warning of the night before, i.e., that she didn't know anything about it and had not been there. That evening, Senior told Mary that Ackley was in the basement of the Pickens home and that he had put some clothes on him and given him coffee, wine and a pill and that he had cleaned up the Pickens living room. The following day, Saturday, February 28, Mary again spoke to Senior, who told her that Pickens had said that Ackley had left. The next day, Sunday, March 1, Senior told Mary that he didn't know where Ackley was. On Monday, March 2, Mary read about the body found at Sharp Park. Senior came to her room and she said: "My Lord, that was, that was Ackley's body out there"; he said: "Yeah. Kid, the heat's on." He told Mary to stay in her room and not go out in the bars and promised to bring her all she wanted to drink in her room if she did not go out in the bars or streets.

On Saturday of the following week [March 7], the appellant came to Mary's room; Senior was there and

all three went to the Pickens home. The appellant again told her to remember that she knew nothing about this and had not been there. He also told her that the last time she had seen Ackley was when she saw him with Staley [on the morning of the 26th]. Later, Senior told her he had tried to get rid of Ackley's clothing. Mary identified the clothing found at Devil's Slide, as the clothing Ackley had when he was brought to the Pickens home on February 26.

Later, Mary went to a bar and was questioned by two officers. When she told Senior about this, he cursed, threatened and struck her. She called the appellant who told her that Senior would apologize, which he did.

Lena Galli testified that on the afternoon of February 26, she saw two men force a man out of a car, beat him, and put him in another car, at 16th and Valencia Streets. Opal Fanning testified that about 4 o'clock that same afternoon, the appellant and Senior visited her and the appellant told her they would really take care of Ackley; Senior told her: "Me and Ernie are going to find Chuck [Ackley] and if Ernie [the appellant] is going to do any killing, I'll help him."

The first argument on appeal is that the evidence does not support the verdict of first degree murder, but at most shows murder in the second degree, or voluntary manslaughter. Section 189 of the Penal Code so far as relevant defines murder in the first degree as "'[a]ll murder which is perpetrated by means of . . . *torture.*" [Emphasis supplied.] Murder by torture is characterized by the intent of the defend-

ant to inflict grievous pain and suffering upon his victim either for purpose of revenge, extortion, persuasion or to satisfy some sadistic impulse. (*People v. Daugherty,* 40 Cal.2d 876 [256 P.2d 911]; *People v. Misquez,* 152 Cal.App.2d 471, 480 [313 P.2d 206].) The fact of the victim's pain and suffering is not enough to establish murder by torture unless there is also evidence that the defendant possessed the intent to cause cruel suffering. (*People v. Caldwell,* 43 Cal. 2d 864 [279 P.2d 539].) Appellant argues that there is no evidence of his intent to cause cruel suffering. When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is first degree murder. (*People v. Turville,* 51 Cal.2d 620 [335 P.2d 678].) We think the above summary of the evidence clearly indicates that the evidence is more than ample to sustain the verdict. It is not necessary to set forth the sordid events and appellant's participation therein in any greater detail. This is as clear a case of murder by torture as can be found in the annals of the law.

Appellant next argues that at the time of the offense, he was so intoxicated that he could not form the requisite intent, and that the jury was improperly instructed on the effect of his alleged intoxication. There is no merit in this argument. The appellant himself testified that he had been drinking heavily and was full of port wine, but knew what he was doing and what he said. He remembered that there was an incident with the dog; and also when Mary

and Senior left. His wife testified that although the appellant was drunk, he could stand, walk and talk. Mary testified that everyone was not intoxicated on the afternoon in question. Senior did not testify at the trial. The only other witness who supported appellant's theory of alleged intoxication was Opal Fanning. The jury was properly instructed in the language of section 22 of the Penal Code and *People v. Caldwell, supra. (People v. Gorshen,* 51 Cal.2d 716 [336 P.2d 492].) In view of the conflicting evidence, the jury's resolution of the effect of the alleged intoxication on the appellant's ability to form the requisite intent is conclusive on appeal. *(People v. Deloney,* 41 Cal.2d 832 [264 P.2d 532].)

Appellant next argues that he was provoked to "hot passion" against Ackley so that the offense could have been voluntary manslaughter and the trial court erred in failing to instruct the jury on voluntary manslaughter. We cannot agree. The only provocation occurred long before the victim was brought to the appellant's home on February 26. The trial court, therefore, properly concluded that the only kind of manslaughter applicable to the case was involuntary manslaughter and so instructed the jury.

Appellant also argues that the jury had to base its implied finding of premeditation on conjecture as they found Senior guilty of only second degree murder and there is no rational distinction between Senior's acts and the appellant's. In the light of the facts presented, it is obvious that the appellant was the chief instigator and perpetrator of the events which cul-

minated in the death of Ackley; nor is it in any way unusual or improper for a jury to find codefendants in a joint trial guilty of different offenses or different degrees of the same offense *(People v. Turville,* 51 Cal.2d 620, 638 [335 P.2d 678]; *People v. Blackwood,* 35 Cal.App.2d 728 [96 P.2d 982]).

The second major argument on appeal is that the trial court erred to the prejudice of the appellant, by allowing the district attorney to improperly impeach his own witness, James Fanning. James Fanning was called as a witness but could not remember the visit. He stated he was drunk all day. The district attorney then asked if Fanning remembered a conversation with certain police inspectors on March 12, 1959. Fanning replied that he did not remember as he was also drunk that day. Thereafter, the district attorney attempted to refresh Fanning's recollection with a statement made to the police inspectors. Fanning also could not remember making this statement. Mrs. Fanning then testified that on the afternoon of February 26, the appellant and Senior visited her at her home at 331 Valencia Street and told her of their intentions to take care of Ackley.

Appellant argues that this was improper impeachment, as the witness, James Fanning, only testified on direct examination that he did not remember any conversation with the appellant and the People's case was not "damaged." Appellant bases his argument on *People v. Newson,* 37 Cal.2d 34 [230 P.2d 618]. However, it is now clear that the Newson case did not lay down a rule that all negative answers are harmless,

and it is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached has actually damaged the party calling him. *(People v. LeBeau,* 39 Cal.2d 146 [245 P.2d 302].) We think that in the instant case, the prosecution suffered a loss of position when the witness Fanning stated that he could not remember the conversation *(People v. Spinosa,* 115 Cal.App.2d 659, 667 [252 P.2d 409]). To permit impeachment of one's own witness in this state, three elements must exist: (1) damage to the party calling the witness; (2) materiality of the evidence; and (3) surprise at his present testimony. *(People v. Spinosa, supra,* at 665; *People v. LeBeau, supra,* at 148.) When a witness testifies that he does not remember making his previous statements, it is competent to prove them for the purpose of impeachment. *(People v. Roach,* 148 Cal.App.2d 364, 370 [306 P.2d 523]; *People v. Bjornsen,* 79 Cal.App.2d 519, 535 [180 P.2d 443]; *People v. Gibson,* 154 Cal.App.2d 67, 72 [315 P.2d 442].) Here, the district attorney merely laid a foundation for impeachment. The actual impeachment occurred when the next witness, Mrs. Fanning, testified that the appellant was at her home on the afternoon in question and told her of their plans.

The final argument on appeal is that the appellant was denied due process because the court erroneously permitted the introduction into evidence of the alleged involuntary, illegally obtained confession of the codefendant Senior. The statement in question was on a tape recording, which was received into evidence;

a transcript of the tape was incorporated in the reporter's transcript by stipulation. When this evidence was originally offered, it was only against the declarant Senior and the district attorney stated that it would not be admissible against the appellant who was not present when the statement was taken. Appellant's counsel below objected on the ground that the statement was a self-serving declaration on behalf of Senior and contained no admissions against Senior's interest. Senior's counsel joined in the objection which was overruled by the trial court. The court then overruled appellant's counsel's objection to the passing of the tape to the jury, pursuant to *People v. Wojahn,* 169 Cal.App.2d 135 [337 P.2d 192], and before the tape was played, the jury was then instructed that the statement could only be considered in relation to the guilt of Senior and not in relation to the guilt of the appellant. A similar instruction was repeated during the later formal instructions to the jury.

Appellant now argues that this statement was not a confession or admission by Senior but a self-serving statement and an accusation against him, and seeks to bring himself within the rules of the coerced confession cases. There is no question that under the circumstances outlined above, evidence of a confession or admission by one of several codefendants is admissible under proper instructions limiting its consideration to the declarant, even though such evidence includes statements which tend to incriminate the codefendants. (*People v. Turville, supra; People v.*

Chavez, 50 Cal.2d 778 [329 P.2d 907]; *People v. Martinez,* 19 Cal.App.2d 599 [66 P.2d 161].) The few cases to the contrary presented very unusual circumstances: In *People v. Zammora,* 66 Cal.App.2d 166 [152 P.2d 180], there were 22 defendants; in *People v. Foote,* 48 Cal.2d 20 [306 P.2d 803], the statement lasted four hours, so that the court concluded that the statements were irrelevant and unnecessary and might confuse the jury under the circumstances.

In the instant case, the statement was wholly concerned with the circumstances surrounding the killing of Ackley and only corroborated Mary Maribo's testimony about Senior's participation therein.

The matter was also carefully considered by the trial court on the motion for a new trial, and it was pointed out that although appellant's counsel had a transcript of the statement before it was offered into evidence, he did not specify the specific portions he objected to in order to give the trial court an opportunity to correct any possible error *(People v. Lang Transportation Corp.,* 43 Cal.App.2d 134 [110 P.2d 464]), but simply objected to the entire statement.

As to the involuntariness of the statement, this matter was not raised below, but the only objection raised was that the statement was an accusation against the appellant. Thus, the question cannot be considered on appeal *(People v. Hurst,* 36 Cal.App.2d 63 [96 P.2d 1003]), unless there has been such a denial of due process of law that the entire conviction is void. *(People v. Millum,* 42 Cal.2d 524 [267 P.2d 1089].) We can find no such denial of due process here due

to the introduction of the statement, as the appellant asserts. We know of no authority where a denial of due process has been upheld under such circumstances. (See Maguire, Evidence of Guilt, Restrictions upon Its Discovery or Compulsory Disclosure, ch. 3, §§ 3.01-3.07, pp. 107-154.)

No prejudicial error appearing, the judgment of conviction and order denying the motion for a new trial are each affirmed.

Kaufman, P. J.

Draper, J., and Shoemaker, J., concurred.

Filed March 16, 1961,
Lawrence R. Elkington, Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On November 8, 1967, the California Supreme Court denied, without opinion, petitioner's application for a writ of habeas corpus. (*In re Pickens on Habeas Corpus,* Crim. No. 11,521.) The murder conviction which petitioner now places in issue was affirmed by the California Court of Appeal by an opinion filed on March 16, 1961. *People v. Pickens,* 190 Cal.App.2d

138, 11 Cal.Rptr. 795 (1961). Petitioner did not petition for a rehearing, nor did he petition the California Supreme Court for a hearing, nor did he petition this Court for a writ of certiorari to review the decision by the California Court of Appeal affirming his conviction.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

I. Was the rule of evidence followed by California at the time of petitioner's conviction in 1959 which permitted the statement by his jointly tried codefendant and admissible only against him to be admitted in evidence under appropriate limiting instructions consistent with due process?

II. Should this Court respect the determination by the California Supreme Court not to give retroactive application to its subsequent adoption of a rule of evidence which now renders such statements inadmissible in a joint trial unless all parts implicating codefendants are effectively deleted?

STATEMENT OF THE CASE

On March 19, 1959, an indictment was filed in the Superior Court of San Francisco charging petitioner Ernest C. Pickens and Walter Senior with murdering

Charles Ackley on or about February 26, 1959. Both defendants entered pleas of not guilty. Following a five day trial, the jury found petitioner Pickens guilty of murder in the first degree and Senior guilty of murder in the second degree. On June 8, 1959, judgment was entered sentencing Senior to imprisonment for the term prescribed by law. The penalty phase of trial with respect to petitioner Pickens was heard on June 11, 1959. By stipulation of counsel the court discharged the jury and fixed his punishment at life imprisonment. Petitioner's motion for new trial was denied and on June 11, 1959, judgment was entered sentencing him to imprisonment in the state prison for life.

Petitioner appealed his conviction to the California Court of Appeal which on March 16, 1961, filed an opinion affirming the judgment. *People v. Pickens,* 190 Cal.App.2d 138, 11 Cal.Rptr. 795 (1961). Petitioner filed no petition for rehearing, nor did he petition the California Supreme Court for a hearing, nor did he petition this Court for a writ of certiorari to review the decision by the California Court of Appeal. Petitioner's codefendant Senior took no appeal from his conviction.

STATEMENT OF FACTS

The facts relating to the murder which led to the conviction which petitioner now challenges are set forth in the opinion of the Court of Appeal as follows:

> "The record reveals the following facts: On March 2, 1959, at about 8 a.m., the body of an

individual in his middle sixties, weighing approximately 180 pounds, was found in a grove of trees across from the Sharp Park Golf Course. The autopsy was performed at 1:30 p.m. on March 3, 1959, and it was estimated death had taken place from 30-48 hours earlier. The autopsy disclosed extensive trauma of the entire body. A 2-inch wide strip of the head had been shaved from the forehead to the back of the head. There were superficial abrasions and lacerations of the skin along the shaved strip and a slightly depressed abrasion about 1 inch in diameter on the right forehead. The eyes were swollen shut and discolored, evidencing hemorrhages; the nose was markedly distorted, showing a fracture of the nasal cartilage and was filled with dried blood. The upper lip had a cut through the entire lip and the lower lip showed a deep laceration. Both lips were covered with blood and covered with dirt—like material was on the tongue. There were numerous small bruises around the neck and shoulders and on the back, chest, left abdomen and hip and areas of discoloration about 1 inch in diameter, representing similarly inflicted types of injury, as well as breaks in the skin over the left hip and left thigh and similar injuries to the buttocks.

"The chest area showed a complete transverse fracture of the entire body of the sternum. As the sternum at the point of fracture is a little less than 1 inch thick, pressure in excess of 100 pounds is needed to cause a fracture. Such pressure may be caused by a kick from a horse, a body impinged on a steering wheel or by one person jumping on the chest of one lying prone. The rib cage was fractured on both sides and the

lungs were both lacerated by fragments of the fractured ribs.

"The coloration of the various bruises indicated that all were not inflicted at the same time, but it was clear that all of the injuries were inflicted before death. The county pathologist was of the opinion that the more recent bruises were inflicted 24 hours before death and the older bruises represented an additional 24 hours. The county pathologist also testified that this was the most severe infliction of injury by human intervention that he had ever seen and concluded that death had been caused by the numerous injuries described above, and that a person with such injuries would suffer severe pain and have great difficulty breathing and moving.

"On March 12, 1959, a gunny sack containing bloodstained clothing, including a belt with the name Charles Ackley on it, was found at Devil's Slide, south of the place where the body had been found. The body was identified as Charles Ackley.

"On March 11, 1959, Mary Maribo was picked up and booked as a drunk by police officers of San Mateo County; she knew the victim, Charles Ackley, who also lived at the Vincent Hotel on Turk Street in San Francisco. On Wednesday, February 25, 1959, the appellant, Pickens, and Senior helped her move from the Vincent Hotel to a room on 16th Street. The appellant lent her the money to pay the rent on her new apartment. As she couldn't move her trunk and other large items to her new home, the appellant took them to his home on Lee Street in San Francisco.

"The next day, Thursday, February 26, Mary saw Ackley about 11 a.m. on Valencia Street

with one Staley; Ackley was drunk and staggering. Mary called the appellant's wife, Wanda, to see if they were going to bring her trunk and things. Mrs. Pickens then invited Mary to come out and help put up some curtains at the Pickens home. The appellant and Senior picked up Mary in their truck about noon and took her to the Pickens home; they then left for a short while to get some groceries. They returned about 1 p.m. with the groceries and 2 fifths of wine. Mary told Wanda that Ackley had said Wanda had been a prostitute before her marriage. Wanda repeated this to the appellant, and apparently gave him the impression that Ackley had said that the appellant had held Wanda while Ackley had intercourse with her. Mary then repeated what she had said and told the appellant that Ackley had said other things about him in a bar. The appellant got very angry, called Ackley a dirty name, cursed, and threatened to make Ackley commit an indecent act with his dog. The appellant and Senior then left.

"They returned to the Lee Street home about 5 p.m. with Ackley and brought him into the house. Ackley's teeth were out of his mouth and his lips were bleeding. Th appellant pushed Ackley into a chair and asked him about the alleged statements. Ackley denied making the statements but the appellant said he knew Ackley had said them and slapped Ackley in the face. Ackley and the appellant slapped at each other until Senior entered and hit Ackley in the face. Ackley tried to defend himself but could not do very much against his two assailants. The two women left the room and could hear the sound of flesh hitting flesh.

"When Mary returned to the living room a short while later, Ackley was naked and lying on the floor. The appellant told her to kick Ackley in the groin, which she did. Wanda and the appellant also kicked him. The two women again left the room; when they returned, they noticed that Ackley's head had been shaved from his forehead to the back of his head, and he was sitting in a chair and asking the appellant and Senior to stop.

"The appellant went outside and came back with a large dog. Ackley said: 'no, no, no,' and the appellant said: 'Oh, yes' and then pushed Ackley's head between the dog's legs. Mary again left the room. When she returned, Ackley was lying on the floor with one eye closed and his entire face bloody and mashed up. The appellant and Senior were sitting on the davenport. As Ackley's blood was getting on the rug, they moved his head into the fireplace. There was blood on the floor from his nose, and feces on his body.

"About 9 p.m., Mary and Senior left in a cab; the appellant told her she hadn't been out there and advised her to say she hadn't seen Ackley that day. The next day, February 27, Mary called the Pickens home and the appellant told her Ackley was all right. He repeated his warning of the night before, i.e., that she didn't know anything about it and had not been there. That evening, Senior told Mary that Ackley was in the basement of the Pickens home and that he had put some clothes on him and given him coffee, wine and a pill and that he had cleaned up the Pickens living room. The following day, Saturday, February 28, Mary again spoke to Senior,

who told her that Pickens had said that Ackley had left. The next day, Sunday, March 1, Senior told Mary that he didn't know where Ackley was. On Monday, March 2, Mary read about the body found at Sharp Park. Senior came to her room and she said: 'My Lord, that was, that was Ackley's body out there'; he said: 'Yeah. Kid, the heat's on.' He told Mary to stay in her room and not go out in the bars and promised to bring her all she wanted to drink in her room if she did not go out in the bars or streets.

"On Saturday of the following week [March 7], the appellant came to Mary's room; Senior was there and all three went to the Pickens home. The appellant again told her to remember that she knew nothing about this and had not been there. He also told her that the last time she had seen Ackley was when she saw him with Staley [on the morning of the 26th]. Later, Senior told her he had tried to get rid of Ackley's clothing. Mary identified the clothing found at Devil's Slide, as the clothing Ackley had when he was brought to the Pickens home on February 26.

"Later, Mary went to a bar and was questioned by two officers. When she told Senior about this, he cursed, threatened and struck her. She called the appellant who told her that Senior would apologize, which he did.

"Lena Galli testified that on the afternoon of February 26, she saw two men force a man out of a car, beat him, and put him in another car, at 16th and Valencia Streets. Opal Fanning testified that about 4 o'clock that same afternoon, the appellant and Senior visited her and the appellant told her they would really take care of

Ackley; Senior told her: 'Me and Ernie are going to find Chuck [Ackley] and if Ernie [the appellant] is going to do any killing, I'll help him.'" 190 Cal.App.2d at 141-145

ARGUMENT

I

THE RULE OF EVIDENCE FOLLOWED IN CALIFORNIA AT THE TIME OF PETITIONER'S CONVICTION IN 1959 WHICH PERMITTED THE STATEMENT BY HIS JOINTLY TRIED CODEFENDANT AND ADMISSIBLE ONLY AGAINST HIM TO BE ADMITTED IN EVIDENCE UNDER APPROPRIATE LIMITING INSTRUCTIONS WAS AND IS CONSISTENT WITH DUE PROCESS.

During the joint trial which resulted in the conviction of petitioner and his codefendant Senior, the prosecution offered and the trial court admitted into evidence an extrajudicial statement by Senior. Prior to the playing of this recorded statement for the jury, the trial judge gave the following instruction:

> "Now, ladies and gentlemen, we're about to play the recording here of Walter Senior, one of the defendants. You will hear his voice in a few minutes, and also the other officers, but I wanted to instruct you, and very carefully on this, that this applies only to Walter Senior, that's the only defendant it applies to—whatever he says, whatever the testimony is recorded here—and it does not apply to the other deefndant, Mr. Pickens, because he was not present, he was not a party to this recording. Do you understand that?
>
> "Very well." (RT 131:16-25.)

Subsequently, during the formal instruction of the jury prior to the time when they retired to deliberate on the case, the court gave this additional instruction:

> "When evidence has been received as to one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose or against any other defendant." (RT 324:5-9.)

One of the issues raised by petitioner on the appeal from his conviction was an assertion that he had been denied due process of law by the admission into evidence over his objection of Senior's statement. Apropos to the argument he now presents to this Court, the Court of Appeal in its discussion disposing of his contention stated:

> "Appellant now argues that this statement was not a confession or admission by Senior but a self-serving statement and an accusation against him, and seeks to bring himself within the rules of the coerced confession cases. There is no question that under the circumstances outlined above, evidence of a confession or admission by one of several codefendants is admissible under proper instructions limiting its consideration to the declarant, even though such evidence includes statements which tend to incriminate the codefendants. (*People v. Turville, supra; People v. Chavez,* 50 Cal.2d 778 [329 P.2d 907]; *People v. Martinez,* 19 Cal.App.2d 599 [66 P.2d 161].) The few cases to the contrary presented very unusual circumstances: In *People v. Zammora,* 66 Cal.App.2d

166 [152 P.2d 180], there were 22 defendants; in *People v. Foote,* 48 Cal.2d 20 [306 P.2d 803], the statement lasted four hours, so that the court concluded that the statements were irrelevant and unnecessary and might confuse the jury under the circumstances." *People v. Pickens, supra,* at 148.

After the affirmance of his conviction on March 16, 1961, petitioner did not further pursue this issue until September 21, 1967, when he filed his petition for writ of habeas corpus with the California Supreme Court, the denial of which he now asks this Court to review. Prior to the time he filed his petition, the California Supreme Court had decided *People v. Aranda,* 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265 (1965), in which it adopted a rule of evidence precluding the prosecution from introducing into evidence during a joint trial an extrajudicial statement by one defendant unless all parts of the statement implicating any codefendants are effectively deleted. In the points and authorities in support of his petition to that court, he argued: "A defendant who invoked the *Aranda* rule in the trial court should be entitled to its retroactive application."

Petitioner now asks this Court to impose upon the various states as a constitutional standard a rule of evidence which this Court in carrying out its supervisory role over the federal courts has not seen fit to impose upon them. Furthermore, in the procedural posture in which this case arises petitioner asks not only that this rule of evidence be adopted as a constitutional standard but that it be given retroactive effect.

We submit that his arguments must be rejected since the rule followed in California at the time of his conviction which permitted the statement by his jointly tried codefendant to be admitted in evidence under appropriate limiting instructions was and is consistent with due process. Not only is it consistent with due process but it conforms to the rule of evidence consistently sanctioned by this Court in its supervisory role over the federal courts.

This Court acting in that capacity has consistently sanctioned and adhered to a rule of evidence which permits an extrajudicial statement admissible only against the declarant to be used in a joint trial when appropriate limiting instructions are given. In *United States v. Ball,* 163 U.S. 662, 672 (1896), this Court stated:

> "It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others. See *Sparf v. United States,* 156 U.S. 51, 58. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; and the court was not afterwards requested to make any further ruling upon this point." 163 U.S. at 672.

In *Opper v. United States*, 348 U.S. 84, 95 (1954), this Court reiterated its approval of this rule of evidence in these strong terms:

> "The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. [Footnote omitted.] To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions."

In *Delli Paoli v. United States*, 352 U.S. 232 (1957), this Court once more adhered to and approved of this rule of evidence. In doing so, it noted:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." 352 U.S. at 242.

In support of our assertion that the rule of evidence followed by California at the time of petitioner's conviction is consistent with current federal practice,

we consider it pertinent to point out that the former California rule was subject to limitations and did not afford a blanket sanction for the use of such statements under any circumstance. In *People v. Foote,* 48 Cal.2d 20, 23, 306 P.2d 803 (1957), the California Supreme Court articulated these limitations as follows:

> "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *See also, People v. Chavez,* 50 Cal.2d 778, 790, 329 P.2d 907 (1958); *People v. Zammora,* 66 Cal.App.2d 166, 211-12, 152 P.2d 180 (1944).

These limitations place the then prevailing California rule of evidence in clear conformity to current federal practice. As this Court noted in *Delli Paoli:*

> "There may be practical limitations to the circumstances under which a jury should be left to follow instructions but this case does not present them. As a practical matter, the choice here was between separate trials and a joint trial in which the confession would be admitted under appropriate instructions. Such a choice turns on the circumstances of the particular case and lies largely within the discretion of the trial judge." 352 U.S. at 243.

Petitioner, in an argument suggested by *People v. Aranda,* 63 Cal.2d 518, n.7 at 529, 47 Cal. Rptr. 353, 407 P.2d 265 (1965), argues that *Delli Paoli* appears overruled by implication by this Court's holding in

Jackson v. Denno, 378 U.S. 368 (1964). We find this argument more than answered by this Court in *Spencer v. Texas,* 385 U.S. 554 (1967). We find particularly pertinent in this regard the following language in *Spencer.*

> "To say the United States Constitution is infringed simply because this type of evidence [evidence of past convictions for sentencing purposes] may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. See *Delli Paoli v. United States,* 352 U.S. 232; cf. *Opper v. United States,* 348 U.S. 84; *Krulewitch v. United States,* 336 U.S. 440. This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." 385 U.S. at 562.

> "Cases in this Court have long acted on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, *e.g., Tumey v. Ohio,* 273 U.S. 510;

Betts v. Brady, 316 U.S. 455; cf. *Gideon v. Wainwright,* 372 U.S. 335; see *Estes v. Texas,* 381 U.S. 532; *Sheppard v. Maxwell,* 384 U.S. 333; cf. *Griffin v. Illinois,* 351 U.S. 12. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' *Snyder v. Massachusetts,* 291 U.S. 97, 105. See also *Bucharter v. New York,* 319 U.S. 427.

"Petitioners' reliance on *Jackson v. Denno,* 378 U.S. 368, is misplaced. There the court held unconstitutional the New York procedure leaving to the trial jury alone the issue of the voluntariness of a challenged confession, an area of law that has been characterized by the development of particularly stiff constitutional rules. See *Rogers v. Richmond,* 365 U.S. 534; *Miranda v. Arizona,* 384 U.S. 436. The court held that a judicial ruling was first required to determine whether as a matter of law—federal constitutional law—the confession could be deemed voluntary.

This requirement of a threshold hearing before a judge on the federal question of voluntariness lends no solid support to the argument made here —that a two-stage jury trial is required whenever a State seeks to invoke an habitual-offender statute. It is true that the court in *Jackson* supported its holding by reasoning that a general jury verdict was not a 'reliable' vehicle for determining the issues of voluntariness because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence. But the emphasis there was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury. In the procedures before us, in contrast, no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general 'fairness' approach. In this area the court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take *Jackson* as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose. Compare *Opper v. United States,* 348 U.S. 84; *Leland v. Oregon,* 343 U.S. 790. [Footnote omitted.]" 385 U.S. at 563-65.

II

ALTHOUGH THIS RULE OF EVIDENCE HAS SINCE BEEN CHANGED IN CALIFORNIA, THIS COURT SHOULD RESPECT CALIFORNIA'S DETERMINATION NOT TO GIVE THE CHANGE RETROACTIVE APPLICATION.

In 1965, the California Supreme Court in *People v. Aranda*, 63 Cal.2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965), changed the rule of evidence in effect at the time of petitioner's conviction and established a rule which permits the introduction in evidence of an extrajudicial statement by one defendant at a joint trial only if all parts of the statement implicating any codefendants are effectively deleted. In so doing, the California court noted that it acted not under constitutional compulsion but rather by way of declaring a rule of practice to implement a state Penal Code section.

> "In section 1098 of the Penal Code, the Legislature, while providing that the courts might order separate trials for defendants jointly charged with any public offense, left to the courts the determination of standards governing such severances. The grave constitutional doubts [footnote omitted] engendered by our present practice of permitting joint trials when the confession of one defendant implicates codefendants has prompted our reconsideration of this practice. Whether or not it is constitutionally permissible, the practice is prejudicial and unfair to the nondeclarant defendant and must be altered.
>
> " '[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to

mend.' *(United States v. Delli Paoli* (2d Cir.) 229 F.2d 319, 323 [Frank, J., dissenting].)

"In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098. [Footnote omitted.]" 63 Cal.2d at 529-30.

Subsequently, the California Supreme Court had occasion to consider whether the rule established by it in *Aranda* should be given retroactive application. In *People v. Charles,* 66 Cal.2d 330, 333, 57 Cal.Rptr. 745, 425 P.2d 545 (1967), the court stated:

"The rules outlined in *Aranda* were designed to alter a practice which we deemed unfair to defendants who were implicated by the out-of-court declarations of their codefendants. We recognized that the prevailing practice rested upon the unrealistic hypothesis that the finder of fact could consider such declarations in determining the guilt or innocence of the declarant but ignore them in deciding the guilt or innocence of a codefendant. Our ruling, however, did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants, and we were careful to point out that the rules announced were at least not yet constitutionally compelled. *(People v. Aranda, supra,* 63 Cal.2d at p. 530.) The purposes of *Aranda* thus do not require its application to convictions long since final. *(Cf. People v. Rollins, supra,* 65 Cal.2d 681, 685; *In re Lopez* (1965) 62 Cal.2d 368, 376-378 [42 Cal.Rptr. 188, 398 P.2d 380].)" 66 Cal.2d at 333.

We submit that California's decision to deny retroactive application to the change in law effected by *Aranda* presents no federal question. Indeed, this Court has similarly denied retroactive application to decisions establishing new constitutional standards. *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
April 8, 1968.

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
6000 State Building,
San Francisco, California 94102,
Telephone: 557-0357,
Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

The respondent, Arthur L. Oliver, Warden, California State Prison at Folsom, and the real party in interest, the People of the State of California, respectfully petition under Rule 58 for a rehearing by this Honorable Court of the above entitled cause.

PRELIMINARY STATEMENT

We respectfully urge this Court in considering this petition for rehearing to bear in mind that the salient

issue involved in this case, the retroactivity of *Bruton v. United States,* 36 U.S.L.Week 4447 (May 20, 1968), was neither briefed nor argued. The Court's per curiam opinion here is not, of course, the definitive decision with respect to this issue. However, the definitive decision, *Roberts v. Russell,* 36 U.S.L.Week 3472, was similarly decided by this Court in a per curiam opinion which came down the same day. We also urge this Court to grant the petition of the State of Tennessee for a rehearing in that case.

We are appalled at the cavalier manner in which this Court has resolved an issue which results in so tremendous an impact upon the administration of justice, not only in the states but in the federal system. And we are stunned at the casual manner in which this Court dismisses the reliance of courts and prosecutors upon one of its recent decisions which not only found no constitutional impediment in the former procedure but which approved of its use in the federal system. The Court now says, "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." *Roberts v. Russell, supra.* Must prosecutors and judges now select which other decisions of this Court they should discontinue reliance upon for fear that at some future time the Court will tell them their reliance was ill-conceived?

Delli Paoli was decided in 1957. The petitioner in this case was convicted of murder in California two years later in a trial in which a rule of evidence, similar to that sanctioned in *Delli Paoli,* was followed.

California's utilization of such a rule of evidence can be attributed in no small measure to the fact that in *Delli Paoli,* this Court, in its supervisory capacity over the federal courts, reiterated its approval of a similar rule of evidence. Under such circumstances we do not view it as unreasonable that California, at least until 1965, continued to rely on this Court's conclusion that jurors were capable of following limiting instructions.

Nor are the fears which we express concerning the impact of retroactivity mere rhetoric. At the very outset it is obvious that the defendants who would reap the benefit of a decision imposing retroactivity are those who have acted in concert with other individuals in the commission of the crime of which they stand convicted; those who have participated in gang activity or in criminal conspiracies.

Moreover, it is common knowledge that the prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons under long-term sentence who have been confined for an extended period of time. It is these hardened and dangerous criminals whose cases would afford the least likelihood of a successful retrial. To require a general release of such prisoners who were tried under circumstances which this Court had approved as perfectly fair and reasonable would strike a devastating blow at the orderly administration of the criminal law. We submit that the confidence of the bench, the bar and the people in our system of justice would be severely and justifiably shaken by such a decision.

It is one thing for the Court to tell the judges and prosecutors of this Nation that a practice formerly sanctioned by this Court can no longer be considered fair and that they must henceforth conform to a new standard. It is quite another for the Court to tell those responsible for the administration of criminal justice not only that the former practice must be abandoned but that every conviction which occurred in reliance on it must be voided.

ARGUMENT

THE CHANGE IN LAW EFFECTED BY THIS COURT IN BRUTON v. UNITED STATES SHOULD NOT BE AFFORDED RETROACTIVE APPLICATION.

We respectfully urge that the new constitutional standard articulated in *Bruton v. United States,* 36 U.S.L.Week 4447, should be denied retroactive application. In several recent cases this Court has denied retroactive application to constitutional rules of criminal procedure established by innovative decisions which overruled cases sanctioning former practice. *Stovall v. Denno,* 388 U.S. 293 (1967); *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Tehan v. Shott,* 382 U.S. 406 (1966); *Linkletter v. Walker,* 381 U.S. 618 (1965). The relevant considerations in determining whether such a newly adopted rule should be applied retroactively were succinctly stated in *Stovall v. Denno, supra,* at 296-97 as follows:

> " 'These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make

> the rule prospective . . . where the exigencies of the situation require such an application" . . . .' *Johnson, supra,* 384 U.S., at 726-727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

We are persuaded that a weighing and a balancing of these three relevant considerations leads inevitably to the conclusion that *Bruton* should be denied retroactive application. We, along with the California Supreme Court, do not harbor "a belief that the former procedure created a great risk of convicting innocent defendants." *People v. Charles,* 66 Cal.2d 330, 333, 57 Cal.Rptr. 745, 425 P.2d 545 (1967). That this belief was not unreasonable draws some confirmation from the fact that it was shared by this Court until this year.

That it was the purpose of this Court in *Bruton* to enhance the reliability of the fact-finding process at trial is clear beyond question. But this conclusion in itself does not compel a retroactive application of the new doctrine. As the Court said in *Johnson v. New Jersey, supra,* 384 U.S. at 728-29:

> "Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with a question of probability and must take account,

among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

This Court then went on in *Johnson* to hold that the exclusionary rules articulated in *Escobedo v. Illinois,* 378 U.S. 478 (1964), and in *Miranda v. Arizona,* 384 U.S. 436 (1966), applied only to cases coming to trial after the respective dates of those decisions.

Similarly, in *Stovall v. Denno, supra,* this Court limited the applicability of the new exclusionary rule articulated in *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967), to lineups which were conducted prior to the date of those decisions. And it did so notwithstanding the fact that the new rule was one which went to the reliability of the fact-finding process at trial. In this regard, this Court said:

> "A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so." *Stovall v. Denno,* 388 U.S. at 297.

Thus, in determining whether the rule pronounced in *Bruton* should be applied retroactively, this Court must first weigh the probabilities and determine the extent to which the former practice infected "the integrity of the truth-determining process at trial."

And in making that determination, this Court should "take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." *Johnson v. New Jersey, supra,* at 729.

In 1965, the California Supreme Court in *People v. Aranda,* 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265 (1965), established a state rule of practice which is essentially identical to the constitutional standard established by this Court in *Bruton.* It did so because it entertained grave constitutional doubts as to the validity of the former practice and because it considered the former practice as prejudicial and unfair to the non-declarant defendants. *People v. Aranda, supra,* 63 Cal.2d at 529.

However, when that same court subsequently determined whether the rule it established in *Aranda* should be given retroactive application, it concluded that the purposes of the new rule did not require its application to convictions which had become final. *People v. Charles, supra.* In so doing, it noted that its ruling in *Aranda* "did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants." *People v. Charles, supra,* 66 Cal.2d at 333. The conclusion of the California Supreme Court that the former practice did not create a grave risk of convicting innocent defendants is eminently reasonable.

Under the former California practice appropriate limiting instructions had to be given whenever an extrajudicial statement admissible only against the

declarant was used in a joint trial. Indeed, as a matter of practice, such instructions would be given to the jury not only when they were formally instructed prior to their deliberation but also when the statement was introduced.

With respect to the ability of a jury to follow such limiting instructions, this Court said in *Opper v. United States*, 348 U.S. 84, 95 (1954):

> "The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. [Footnote omitted]. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdit. Our theory of trial relies upon the ability of a jury to follow instructions."

To the same effect, this Court said in *Delli Paoli v. United States, supra*, at 242:

> "It is a basic premise of our jury system that the court states the law to the jury and the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

With regard to the impact which the former California practice may have had on the integrity of the fact-finding process at trial, it is also significant to note that the use of such statements in a joint trial was carefully circumscribed to avoid prejudice to the non-confessing codefendants. "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *People v. Foote,* 48 Cal.2d 20, 23, 306 P.2d 803 (1957). *See also, People v. Chavez,* 50 Cal. 2d 778, 790, 329 P.2d 907 (1958); *People v. Zammora,* 66 Cal.App.2d 166, 211-12, 152 P.2d 180 (1944).

We submit, therefore, that the former California practice was attended by effective safeguards which ensured the integrity of the truth-determining process at trial. Under these circumstances, the probability that this former practice resulted in any improper convictions is extremely small and furnishes little support for a decision imposing *Bruton* retroactively. Particularly so, when this limited probability is weighed against the prior justified reliance upon the old standard and the tremendous impact which retroactivity would have upon the administration of justice.

That reliance upon the old standard was justified and reasonable cannot be denied. Not only was our former state practice considered consistent with due process but it conformed to the rule of evidence consistently approved by this Court in its supervisory role over the federal courts prior to its decision this

year in *Bruton*. See e.g., *United States v. Ball*, 163 U.S. 662, 672 (1896); *Opper v. United States, supra; Delli Paoli v. United States, supra*. These decisions are operative facts and the consequential reliance upon them by state and federal courts and prosecutors cannot justly be ignored.

The newly defined constitutional right which now prohibits a trial procedure which previously had the express approval of this Court should not be applied retroactively. To do so would not only impose impossible burdens upon the administration of criminal justice, but would have a devastating effect upon the confidence of the bench, the bar and the general public in the courts. Judges and prosecutors would be compelled to speculate as to which other decisions by this Court they must discontinue reliance upon for fear that at some later point in time this Court will tell them their reliance was ill-conceived and the offender must be freed.

The beneficiaries of such a decision would of necessity be those who had acted in concert with other offenders; gang members and members of criminal conspiracies. Those prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons under long-term sentences who have been confined over an extended period of time, since their cases would afford the least likelihood of a successful retrial. To require a general release of such prisoners would cripple the orderly administration of the criminal law. We respectfully submit that this Court should hold that the rule estab-

lished in *Bruton* is not available to retroctively attack a judgment of conviction.

CONCLUSION

For the foregoing reasons, we respectfully request that a rehearing be granted in this case so that the tremendously important issue involved may be appropriately briefed and argued before the question is resolved by this Court.

Dated, San Francisco, California,
July 2, 1968.

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
Attorneys for Respondent.